

No. 15973

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MILDRED BECKER SCHULTZ,

Appellant,

vs.

CARL HOEFLE and DELMAR S. PORTER, individually and as copartners dba TUNE TOWNE TUNES; CAPITOL RECORD, INC.; CAPITOL RECORDS DISTRIBUTING CORP.; HILL AND RANGE SONGS, INC.; RUMBALERO MUSIC, INC.; BROADCAST MUSIC, INC.; DECCA RECORDS, INC.; LOEW'S INCORPORATED; RADIO CORPORATION OF AMERICA; and COLUMBIA RECORDS, INC.,

Appellees.

Appellees' Brief, for Carl Hoefle and Delmar S. Porter, Individually and as Copartners d.b.a. Tune Towne Tunes; Capitol Records, Inc.; Capitol Records Distributing Corp.

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Adoption and Incorporation by Reference of Co-Appellees Answering Brief.

The appellees Capitol Records, Inc., a Corporation, Capitol Records Distributing Corp., a Corporation, Carl Hoefle and Delmar S. Porter, Individually, and as Copartners dba under the fictitious firm name and style of Tune Towne Tunes, have joined in the brief filed on behalf of appellees Hill and Range Songs, Inc., Rumbalero

Music Inc., Broadcast Music Inc., Decca Records, Inc., Loew's Incorporated, Radio Corporation of America, and Columbia Records.

By joining in said brief as though filed by said appellees, reference is hereby made to the same, in every and all particulars, and repeated hereafter as though set forth in its entirety.

I.

Counsel for appellees plays a musical instrument. The reporter's transcript indicates that in the interrogation of witnesses he played the violin, to illustrate the interrogations put to the witnesses. [R. 162.]

Thus, in the interrogation of the witness George G. Schneider, a qualified expert, the following is noted:

"Q. (Mr. Ruiz plays violin): Now, with respect to the research that you have done and predicated upon your experience as a musicologist, can you give us your studied opinion as to whether that effect, that bouncing effect which she described as syncopation, is original, or is it something that has been in the musical field for some time? A. It has been in the musical field for hundreds of years."

The Court below *listened* to the musical compositions at issue and then rendered its judgment in favor of appellees. The quality of syncopation, rhythmic accenting, tempo, time values and differences in form notation and impulse, as well as sequence of notes, must of necessity *be heard*, inasmuch as auditory impression is involved.

To write a cumulative brief upon the law applicable and to further geometrically pave musical structure will add little to the excellent brief submitted by co-appellees and will not serve to make any auditory perception. Appellees

therefore respectfully suggest that if perchance an appellate court justice in the case at bar not be endowed with the perceptive talents of a professional arranger or composer who may experience an auditory reaction by reading evidence in written form, that the recordings played below, and which appear upon the tape recorder of the court reporter, be ordered to augment the record and be replayed, and request is hereby made that the auditory record, complement the reporter's transcript at the time of oral agreement.

Appellees will submit the question of similarity or dissimilarity upon the tonal impressions which the Justices might receive upon said play-back, in the event by the reading of the brief heretofore incorporated by reference, and joined in by these responding appellees, there may remain some doubt on any material matter.

Respectfully subnitted,

MANUEL RUIZ, JR.,

Attorney for Appellees.

